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In The Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

vs.

MICHAEL J. HASON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

Michael Hason applied for licensure as a physician in California. Pursuant to its mission to protect the public health and safety, the Medical Board of California denied Hason's application. Hason claimed the Medical Board improperly denied his application on the basis of his mental illness, and he sued the Board in federal court, alleging a violation of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. The action was dismissed by the district court on grounds of sovereign immunity. However, reasoning that this Court's analysis in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) applied only to Title I of the ADA and not to actions arising under Title II of that Act, the Ninth Circuit reversed the district court's dismissal and held that California's denial of a medical license to Hason stated a cause of action for discrimination under Title II of the ADA. The questions presented are:

1. Does the Eleventh Amendment bar suit under Title II of the ADA against the California Medical Board for denial of a medical license based on the applicant's mental illness?

2. Does Title II of the ADA limit the authority of the California Medical Board to deny an applicant licensure as a physician because of the applicant's mental illness?

LIST OF PARTIES

Petitioner (Defendant and appellee in Court below):

Medical Board of California (an agency of the State of California)

Respondent (Plaintiff and appellant in Court below):

Michael J. Hason

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Medical Board of California ("Medical Board" or "Board") respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit that concluded that Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq., abrogated California's sovereign immunity under the Eleventh Amendment, and held that Title II of the Americans With Disabilities Act of 1990 applies to the licensing of physicians by the California Medical Board. In a decision made without the required abrogation analysis set forth by this Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Ninth Circuit held that the Eleventh Amendment does not bar suit against the Medical Board by an individual who claimed he was denied State licensure as a physician based upon his mental illness. The decision permits respondent to collaterally attack the Medical Board's administrative decision under Title II.

Unless this Honorable Court accepts this case for a writ review, an erroneous decision with significant national ramifications affecting the public health and safety will become precedent and California will be improperly subjected to suit in U.S. District Court without its consent in abrogation of the Eleventh Amendment.

OPINIONS BELOW

The original decision of the United States Court of Appeals for the Ninth Circuit, dated February 12, 2002, is set forth in the Appendix at App. 1 through App. 13, and is published at 279 F.3d 1167. The order denying a petition

for rehearing en banc, with a dissenting opinion signed by four judges of the Ninth Circuit, dated June 26, 2002, appears in the Appendix at App. 26 through App. 36, and is published at 294 F.3d 1166. The judgment of the United States District Court for the Central District of California, dated April 27, 2002, is set forth in Appendix at App. 14, and the February 1, 2000 Report and Recommendation of the Magistrate Judge, adopted by the judgment, is set forth in the Appendix at App. 17 through App. 25.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, denying the petition for rehearing en banc, was filed and entered on June 26, 2002, and is now final.

This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1254(1).

Given the Eleventh Amendment question presented in this petition, 28 U.S.C. § 2403(a) may apply. Copies of this petition for writ of certiorari are therefore being served on the Solicitor General of the United States. The General Docket of the Court of Appeals for the Ninth Circuit does not indicate whether the Ninth Circuit served the United States Attorney for the Central District of California notice that the appeal drew into question the constitutionality of 42 U.S.C. § 12132.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution states:

> "The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> "Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
>
> . . .
>
> "Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

Title II of the Americans With Disabilities Act of 1990 provides in pertinent part:

> "The term 'public entity' means –
>
> (A) any State or local government;
>
> (B) any department, agency, special purpose district, or other instrumentality of a State . . . " 42 U.S.C. § 12131.

" . . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

STATEMENT

In March 1995, respondent Michael J. Hason applied for a license to practice medicine in the State of California. In August 1996, based upon the recommendation of an independent medical examiner who concluded that Hason was mentally ill, suffering from a history of depression and multiple drug dependency, the Medical Board of California denied Hason's application for licensure with the State. App. 38 through App. 39, App. 43 through App. 44 ¶ 1, 14-16.[1]

Hason sought administrative review of the Board's decision, and the denial was affirmed after hearing. App. 38, App 45, ¶¶ 1, 24. Hason did not seek state court review of the administrative decision, although such review was

[1] The Medical Board is an agency within the California Department of Consumers Affairs charged with administering the provisions of California's Medical Practice Act. Cal. Bus. & Prof. Code § 2000, et seq. The Board consists of a Division of Licensing and a Division of Medical Quality. Cal. Bus. & Prof. Code § 2003. The Board's Division of Licensing is responsible for the issuance of medical licenses. Cal. Bus. & Prof. Code § 2005. The Division of Medical Quality is charged with disciplining licensed physicians who violate the Medical Practice Act. Cal. Bus. & Prof. Code § 2004. The Board's primary purpose is protection of the public and ensuring the safe practice of medicine in the State. Cal. Bus. & Prof. Code § 2229.

available. *See* Cal. Govt. Code § 11504, Cal. Code Civ. Proc. § 1094.5. Instead, on April 21, 1999, Hason filed the present action in district court.

In district court, Hason alleged for the first time that the Board's denial of his application for licensure violated the United States Constitution; 42 U.S.C. § 1983; and Title II of the ADA, 42 U.S.C. § 12132. The complaint also alleged state tort claims, none of which are at issue in this proceeding. Hason named as defendants the Medical Board, and all of its members individually and as officers. The individual defendants were never served, did not appear in the district court, and are not parties to this petition.

On April 27, 2000, the district court issued a judgment dismissing the federal civil rights claims, the ADA claim, and the State tort law claims – all without leave to amend as to the Medical Board. App. 14. The order incorporated a February 1, 2000 report and recommendation of the Magistrate Judge, App. 17 through App. 25, concluding that the claims against the Medical Board and its officers for damages and injunctive relief were barred by the Eleventh Amendment. The report also concluded that Hason did not have a cause of action under Title II of the ADA with respect to alleged discrimination in the Board's decision to deny him a medical license on the basis of a mental illness.

Hason filed a timely notice of appeal. On February 12, 2002 the Ninth Circuit reversed. App. 3. The court held that (1) this Court's *Garrett* decision, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), did not overrule prior Ninth Circuit decisions, *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997) and *Dare*

v. California, 191 F.3d 1167 (9th Cir. 1999), which held that the State is subject to suit under the ADA despite the Eleventh Amendment; and (2) that Title II of the ADA applies to licensing activities of the Medical Board. App. 5 through App. 6, App. 10.[2]

The Board filed a petition for rehearing en banc, which was denied on June 26, 2002. Four circuit judges filed a strongly worded dissenting opinion, authored by Judge Diarmuid O'Scannlain, which invited a grant of certiorari and reversal by this Court. App. 26 through App. 36.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A SPLIT AMONG THE CIRCUITS OVER THE QUESTION WHETHER THE ELEVENTH AMENDMENT BARS SUIT AGAINST STATES FOR ALLEGED VIOLATION OF TITLE II OF THE ADA

A. The Ninth Circuit's Error in Refusing to Apply this Court's *Garrett* Analysis to Title II of the ADA Results in the Improper Abrogation of California's Sovereign Immunity

As the dissent from the denial of rehearing *en banc* emphasized, the *Hason* opinion does not deal in any

[2] The court upheld the dismissal of the individual defendants in their personal capacities, but held that they could be sued in their official capacities for future injunctive relief.

meaningful way with the Eleventh Amendment abrogation analysis required by *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (*Garrett*). In *Garrett*, this Court analyzed the Eleventh Amendment immunity with respect to Title I of the ADA, and articulated a framework for analyzing whether the sovereign immunity granted to the States under the Eleventh Amendment is abrogated by the enactment. In upholding Alabama's sovereign immunity against suit by a university employee, the Court emphasized that in order to abrogate state immunity, there must be an unambiguous expression of Congressional intent to do so, and a valid exercise of power under § 5 of the Fourteenth Amendment. This Court also explained that in order to invoke § 5 (and abrogate a State's immunity), the enactment must have been supported by Congressional findings of a history and pattern of state violations of the Fourteenth Amendment and, in addition, that the reach of the statute must be congruent and proportional to the constitutional wrong it seeks to remedy. *Garrett*, 531 U.S. at 365, 368.

The Ninth Circuit virtually ignored this Court's Eleventh Amendment analysis, relying instead on its own pre-*Garrett* decisions, *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997) and *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), and holding that, in Title II of the ADA, Congress validly abrogated Eleventh Amendment immunity. Neither of the circuit's pre-*Garrett* decisions included the type of meaningful analysis that *Garrett* made clear is required for determining whether the State retains its Eleventh Amendment immunities under the ADA. For example, in *Clark,* the Ninth Circuit concluded that since the purpose of the ADA was "to prohibit discrimination

against the disabled," 121 F.3d at 1270, and that "Congress explicitly found that persons with disabilities have suffered discrimination," the ADA was therefore "within the scope of appropriate legislation" under § 5 of the Fourteenth Amendment.[3] *Id.* *Clark* also contains no analysis of the legislative history of the ADA nor any substantive consideration of "congruence and proportionality." Nowhere does it address whether there was a history of discrimination by *the States* which the federal government sought to remedy, an important criterion under *Garrett.* See *Garrett*, 531 U.S. at 368. The analysis is completely inadequate under *Garrett.* Similarly, the *Dare* Court's reasoning was circular, acknowledging the "great deference" to be given to Congress' findings concerning protection of the disabled, but failing to reference state agencies as a target source of that discrimination. Nonetheless, the Ninth Circuit considered these cases definitive.

In holding that Title II reflected a valid abrogation of Eleventh Amendment immunity, the Ninth Circuit distinguished *Garrett* on the sole basis that *Garrett* dealt with Title I. But while the holding of *Garrett* did not squarely address Title II, this Court's reasoning most certainly applies. That is what the other circuits and the *Hason* dissent make most clear:

---

[3] As noted by the *Hason* dissent, the claims at issue in *Clark* were brought under Title II, but the Court treated the ADA as a whole, which casts further doubt on the continued validity of the opinion because in *Garrett*, the Court expressly refused to conflate the separate, detailed inquiries required for each of Title I and Title II. App. 30 through App. 31, n.2. (O'Scannlain, J., dissenting, citing *Garrett*, 531 U.S. at 360 n.1.)

> *This sort of blanket generalization, coupled this time with a generous helping of deference to Congress, stands in stark contrast to the provision-by-provision comparison with the constitutional baseline that Garrett requires.* App. 30. (emphasis added).

The very foundation of the *Hason* decision is thus built on precedents of sand. *Hason*, like *Dare* and *Clark* before it, fails to analyze (1) whether Title II was properly enacted based upon an "identified history and pattern" of unconstitutional discrimination *by the States* against the disabled and (2) whether the remedial provisions of Title II are "congruent and proportional to any constitutional violation."

The four judges criticizing the denial of rehearing *en banc* recognized the manifest inadequacy of the court's opinion and essentially invited the Board to seek review by this Court:

> [T]oday's opinion blithely ignores recent Supreme Court precedent and follows superseded cases of our court instead. It bears repeating: This decision cannot possibly be right. See *Vinson v. Thomas*, 288 F.3d 1145, 1157-58 (9th Cir. 2002) (O'Scannlain, J., dissenting); *see also Douglas v. Cal. Dep't of Youth Auth.*, 285 F.3d 1226, 1226-27 (9th Cir. 2002) (O'Scannlain, J., dissenting from denial of rehearing en banc). Because *Hason* all but invites a grant of certiorari and reversal for putting us out of step with the Supreme Court and *creating a split with every other circuit to have considered the issue*, I must dissent from the order denying en banc rehearing." App. 27 through App. 28. (O'Scannlain, J., dissenting; emphasis added).

B. There Is a Clear Split among the Circuits over the Question Whether, in Title II of the ADA, Congress Has Validly Abrogated State Sovereign Immunity under the Eleventh Amendment

The Ninth Circuit is the *only circuit* to have unequivocally refused to apply *Garrett* to a Title II ADA claim against a State agency. In fact, two Circuits have recently overruled their own pre-*Garrett* decisions: *Reickenbacker v. Foster*, 274 F.3d 974, 981 (5th Cir. 2001) (concluding that *Garrett* "effectively overruled" prior circuit precedent holding that Title II validly abrogated State sovereign immunity) and *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001), cert. denied, 122 S.Ct. 1961, 152 L.Ed.2d 1031 (2002) (holding that the circuit's prior decision on Title I was effectively overruled by *Garrett* and that, under the *Garrett* analysis, Title II was also not a valid abrogation of the Eleventh Amendment).

Every other circuit considering the issue has either held that in Title II Congress did not validly abrogate Eleventh Amendment immunity, or that such immunity is still available under certain conditions, all of which are applicable here. See, e.g., *Klingler v. Dir., Dep't of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002) (affirming pre-*Garrett* decision holding that in Title II Congress did not validly abrogate state sovereign immunity); *Erickson v. Bd. of Governors of State Cols. and Univs.*, 207 F.3d 945, 948, 951-52 (7th Cir. 2000) (a pre-*Garrett* decision concluding that "the ADA does not enforce the Fourteenth Amendment," as "the legislative findings in [the ADA] contain not a word about state governments," and that "nothing" in the ADA legislative findings or debates "shows or even asserts" that state governments engaged in irrational

discrimination that would invoke the Fourteenth Amendment); *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002) (holding Title II is constitutional to the extent "that Title is applied to cases in which a court identifies a constitutional violation by the state," e.g. Eighth Amendment prohibition of "cruel and unusual punishment"); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 812, 815-16 (6th Cir. 2002) (en banc) (agreeing that Title II is not a valid abrogation of sovereign immunity when Congress is enforcing the Equal Protection Clause, but holding that it is permissible when enforcing the Due Process Clause); *Garcia v. S.U.N.Y. Health Sciences. Center*, 280 F.3d 98, 110-12 (2d Cir. 2001) (holding that Title II actions may only be brought against States if the plaintiff can establish that the "violation was motivated by discriminatory animus or ill will based on the plaintiff's disability"); and *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698, 707 (4th Cir. 1999) (holding that a regulation enacted pursuant to Title II did not validly abrogate state sovereign immunity.)

II. THE AMERICANS WITH DISABILITIES ACT DOES NOT LIMIT CALIFORNIA'S AUTHORITY TO DENY A MEDICAL LICENSE ON THE BASIS OF AN APPLICANT'S MENTAL ILLNESS

The Ninth Circuit held that issuance of license to practice medicine is a "service, program or activity" within the meaning of Title II of the ADA, 42 U.S.C. §§ 12131(2), 12132. App. 9 through App. 10. The decision is unprecedented among the circuits and, the Board contends, is wrong as a matter of law. Indeed, in a case remarkably

similar to this one, a district court in the Sixth Circuit came to precisely the opposite conclusion. The Michigan district court held that the ADA did not apply to the state medical board's decision to revoke the medical license of a physician with a bipolar disorder. *Alexander v. Margolis*, 921 F.Supp. 482 (W.D. Mich. 1995), *aff'd*, 98 F.3d 1341 (6th Cir. 1996). The district court reasoned that:

> Considering the text of section 12132(2), it is questionable whether the Board's duty to license physicians can be characterized as a "service" being denied to plaintiff or whether the Board's refusal to reinstate his license denies him participation in "programs or activities provided" by a state entity. *The Board of Medicine is, if anything, a service, program or activity provided for the public's benefit and safety, not for the benefit of any given individual who does not meet the state's requirements for practicing medicine.*

Alexander v. Margolis, 921 F.Supp. at 488 (emphasis added). The court in *Alexander* added:

> The very nature of the police powers exercised by state boards of medicine require the state to discriminate on the basis of, among other considerations, a mental condition harmful to the public's safety. By the very nature of the practice of medicine, given the physician's necessary independence to "practice" his art . . . [t]he Board cannot exercise its duty without the discretion to consider the impact of a mental disability upon one's ability to practice with reasonable skill and safety. The danger of irreparable harm to the

> public is too great to deny the Board such discretion. To require otherwise is unreasonable.

Id. (emphasis added).

Alexander correctly states the law, recognizing inherent state power to regulate the practice of medicine for the public health and safety. *Alexander* is also consistent with the First Circuit's reasoning that, "[i]n determining whether 'essential eligibility requirements' are met [for purposes of 42 U.S.C. § 12131(2)], a public entity properly may consider whether an applicant with a disability poses a direct threat to the health and safety of others." *Theriault v. Flynn*, 162 F.3d 46, 48 (1st Cir. 1998).

The very purpose of California's Medical Board is to protect the public, not to provide a "service" for the benefit of applicants. The California Legislature has repeatedly emphasized that the purpose of the Board is to "protect the health, safety, and welfare of the people of California against incompetent or impaired physicians." Cal. Bus. & Prof. Code § 2220. "Protection of the public shall be the highest priority." Cal. Bus. & Prof. Code § 2229. California law includes a comprehensive statutory scheme for addressing physicians who are mentally ill or whose physical illness affects their competency, Cal. Bus. & Prof. Code § 820, et. seq., and California provides full judicial review of licensing decisions, Cal. Code of Civil Proc. § 1094.5, Cal. Bus. & Prof. Code § 2337. As a matter of state policy, when physician rehabilitation and public protection are inconsistent, public protection is paramount. Cal. Bus. & Prof. Code § 2229(c).

Nothing in the statutory scheme of the ADA suggests that, by enacting Title II, Congress intended to intrude upon licensing of physicians pursuant to inherent state

police powers. Nor does it show an intent to permit circumvention of the state's judicial review process available to challenge medical board licensing decisions. In *Bowen v. American Hospital Assn.*, 476 U.S. 610 (1986), this Court held that anti-discrimination laws were not meant to intrude upon medically related decisions. The Court concluded that the regulations governing the care to be provided to severely disabled infants were not authorized by the Rehabilitation Act of 1973, and observed that "Congress has failed to indicate, either in the statute or in the legislative history, that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance." *Id.* at 643. Insofar as the ADA is construed in the same manner as the Rehabilitation Act of 1973, see *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832, n.3. (9th Cir. 1995), the rationale articulated in *Bowen* – that anti-discrimination laws should not intrude on medically related decisions – equally applies herein. The ADA was not intended to be used as a vehicle for "federal superintendence" of decisions determining the fitness of individuals for licensure as physicians.

CONCLUSION

For the reasons stated, the Medical Board of California respectfully requests that its petition for writ of certiorari be granted.

Dated: September 23, 2002

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. HASON, M.D.,	)	No. 00-55784
Plaintiff-Appellant,	)	DC No.
	)	CV-99-04264-AHM
v.	)	
MEDICAL BOARD OF CALIFORNIA; DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA; ARLENE ADAMS, the Director of the Department of Consumer Affairs of the State of California; NEIL FIPPIN, individually, & as the Manager, Licensing Program of the Medical Board of the State of California; MELINDA ACOSTA, individually & as an official of the Medical Board of the State of D.C. No. California; RON JOSEPH, individually & as Executive Director of the Medical Board of the State of California & as Director of the Department of Consumer Affairs of the State of California; BRUCE HASENKAMP, individually & as President of the Division of Licensing of the Medical Board of the State of California; IRA LUBELL, M.D., individually & as President of the Division of Medical Quality of the Medical	)	

Board of the State of California; CAROLE H. HURVITZ; ANABEL A. IMBERT; RAQUEL D. ARIAS, Dr.; KLEA D. BERTAKIS, Dr.; JACK BRUNER, DR.; DANIEL LIVINGSTON; KAREN MCELLIOT; ALAN E. SHUMACHER, Dr.; KIP S. SKIDMORE, individually & as Member of the Medical Board of the State of California's Division of Medical Quality; THOMAS A. JOAS, Dr.; KAREN MCELLIOTT, individually & as Officer of the Medical Board of the State of California & its Division of Licensing; BERNARD ALPERT, individually & as Officer of the Medical Board of the State of California & its Division of Licensing; MICHAEL I. SIDLEY, individually & as Executive of the Medical Board of the State of California's Division of Licensing; RAJA TOKE, Dr., individually & as Executive of the Medical Board of the State of California's Division of Licensing; THE STATE OF CALIFORNIA & SENIOR INVESTIGATOR,

Defendants-Appellees.

Appeal from the United States District Court
For the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted November 6, 2001 –
Pasadena, California

Filed Feb. 12, 2002

Before: Alfred T. Goodwin, J. Clifford Wallace and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Goodwin

COUNSEL

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, California, for the plaintiff-appellant. Joel A. Davis, Supervising Deputy Attorney General, Los Angeles, California, for the defendants-appellees.

OPINION

GOODWIN, Circuit Judge:

Dr. Michael J. Hason appeals the dismissal of his pro se complaint alleging discrimination based on disability in violation of the United States Constitution and Title II of the Americans with Disabilities Act ["ADA"]. We have jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons that follow we reverse and remand.

BACKGROUND

In March of 1995, Michael J. Hason, M.D., applied for a license to practice medicine in the state of California. In April of 1998, the California Medical Board denied, for reasons of mental illness, Dr. Hason's application for a medical license. Dr. Hason subsequently filed a pro se

complaint in federal district court alleging violations of his rights under the United States Constitution (brought pursuant to 42 U.S.C. § 1983) and Title II of the ADA, 42 U.S.C. § 12132. The complaint also alleged state law tort claims which are not at issue on this appeal.

Dr. Hason's complaint named as defendants The Medical Board of the State of California ["The Medical Board"], the Department of Consumer Affairs of the State of California and its director, and various other individuals that were either members of or otherwise affiliated with the Medical Board (in both their official and personal capacities). Dr. Hason sought both damages and injunctive relief.

On April 25, 2000, the District Court dismissed Dr. Hason's complaint without prejudice as to the individual defendants in their personal capacities, and with prejudice as to the two named state agencies and the individual defendants in their official capacities. The Report and Recommendation of the United States Magistrate Judge, which was affirmed in its entirety by the District Court, stated three reasons for dismissing Dr. Hason's complaint. First, the Report concluded that Dr. Hason's claims were barred by the Eleventh Amendment. Second, the Report concluded that Dr. Hason failed to state a claim upon which relief could be granted under Title II of the ADA. Third, the Report concluded that Dr. Hason's claims against the individual defendants in their personal capacities should be dismissed for failure to prosecute.

We review de novo the District Court's dismissal of a complaint for failure to state a claim upon which relief can be granted. *See NL Indus. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986).

DISCUSSION

I. Sovereign Immunity

We begin by considering whether the District Court erred in holding that Dr. Hason's claims were barred by the Eleventh Amendment. The Eleventh Amendment prohibits a private party from suing a nonconsenting state or its agencies in federal court.[1] *See Board of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 363 (2001); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 72-73 (2000); *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 54 (1996); *Hans v. Louisiana,* 134 U.S. 1, 15 (1890). The Eleventh Amendment does not, however, prevent a private litigant from suing a state or its agencies in federal court where Congress has abrogated state sovereign immunity acting pursuant to section 5 of the Fourteenth Amendment. We have previously held that in enacting Title II of the ADA Congress validly abrogated state sovereign immunity, and thus states and their agencies may be sued pursuant to Title II. *See Dare v. California,* 191 F.3d 1167, 1175 (9th Cir. 1999); *Clark v. California,* 123 F.3d 1267, 1270-71 (9th Cir. 1997); *see also Patricia v. Lemahieu,* 141 F.Supp.2d 1243, 1248 (D. Haw. 2001) (observing that the Ninth Circuit has twice rejected the argument that Congress exceeded its constitutional authority in abrogating state sovereign immunity pursuant to Title II of the ADA).

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[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Appellees contend, however, that the Supreme Court's recent decision in *Garrett* overrules both *Clark* and *Dare*. In *Garrett*, the Court held that Congress did not validly abrogate state sovereign immunity in enacting *Title I* of the ADA. *See Garrett*, 531 U.S. at 360. The *Garrett* Court expressly declined to decide whether Congress validly abrogated state sovereign immunity in enacting *Title II* of the ADA. *See id.* at 360 n. 1. We therefore conclude that *Garrett* does not overrule either *Clark* or *Dare*, and that the Eleventh Amendment does not bar Dr. Hason's Title II claims.

The District Court also erred in its treatment of Dr. Hason's federal civil rights claims, brought pursuant to 42 U.S.C. § 1983, against the various individual state officials. The District Court held that Dr. Hason's section 1983 claims were barred by the Eleventh Amendment. In so holding, the District Court failed to recognize the long-established exception to Eleventh Amendment immunity carved out by *Ex Parte Young*, 209 U.S. 123 (1908). The *Ex Parte Young* doctrine provides that the Eleventh Amendment does not bar suits for prospective injunctive relief brought against state officers "in their official capacities, to enjoin an alleged ongoing violation of federal law." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997); *Seminole Tribe of Florida*, 517 U.S. at 73; *Children's Hosp. and Health Ctr. v. Belshe*, 188 F.3d 1090, 1095 (9th Cir. 1999); *Armstrong v. Wilson*, 124 F.3d 1019, 1025 (9th Cir. 1997). Dr. Hason's complaint clearly seeks prospective injunctive relief to enjoin the individual defendants' refusal to issue Dr. Hason a medical license. Thus, under the doctrine of *Ex Parte Young*, Dr. Hason's section 1983 claims seeking

prospective injunctive relief from the individual defendants are not barred by the Eleventh Amendment. The District Court erred in concluding otherwise.

II. Title II of the ADA

We next consider the District Court's dismissal of Dr. Hason's complaint for failure to state a claim for which relief can be granted under Title II of the ADA. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The District Court dismissed Dr. Hason's complaint based on the magistrate judge's two-fold conclusion that (1) the denial of a medical license cannot be challenged under Title II of the ADA because a medical license does not constitute "services, programs, or activities of a public entity" and (2) Dr. Hason is not a "qualified individual with a disability" within the meaning of Title II of the ADA.

With respect to the first of the two above grounds for dismissal, Dr. Hason contends that his complaint properly states a claim because a medical license constitutes "services, programs, or activities of a public entity" under Title II. Dr. Hason argues that the magistrate judge's interpretation of the phrase "services, programs, or activities" to exclude medical licensing is at odds with both the plain language and remedial goals of Title II.

[2] In response, Appellees argue that Title II was not intended to apply to professional licensing. Appellees rely primarily on *Zimmerman v. Oregon Department of Justice,*

170 F.3d 1169 (9th Cir. 1999). In *Zimmerman,* the plaintiff brought an action against his employer alleging that the employer's practices discriminated against him in violation of Title II of the ADA. This Court affirmed the district court's holding that Title II of the ADA does not apply to employment. *See id.* at 1184. In doing so, we conducted a thorough examination of both the wording of Title II and the structure of the ADA, concluding that Congress intended for Title II to apply only to the "outputs" of a public agency, not to "inputs" such as employment. *See id.* at 1173-79.[2]

Relying on *Zimmerman,* Appellees contend that medical licensing does not fall within the scope of Title II because medical licensing is not an "output" of a public agency. According to Appellees, medical licensing is not an "output" because it is a service provided for the benefit of the *public at large,* not for the benefit of *applicants* seeking to obtain medical licenses. *See Alexander v. Margolis,* 921 F.Supp. 482, 488 (W.D. Mich. 1995) (observing that "[t]he Board of Medicine is, if anything, a service, program or activity provided for the public's benefit and safety, not

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[2] The *Zimmerman* court illuminated the "input"/"output" distinction with the following example: "[C]onsider how a member of the public would answer the question, 'What are the services, programs, and activities of the Parks Department in which you want to participate, or whose benefits you seek to receive?' The individual might answer, 'I want to participate in the Wednesday night basketball league, or find out about the free children's programs for the summer months.' The individual would not logically answer, 'I want to go to work for the Parks Department.'" *Zimmerman,* 170 F.3d at 1174. The *Zimmerman* court considered both the basketball league and the children's programs to be "outputs," and it considered an individual going to work for the Parks Department to be an "input."

for the benefit of any given individual who does not meet the state's requirements for practicing medicine").

[3] We are not persuaded by Appellees' argument. Viewed in the light of the *Zimmerman* framework, medical licensing is an output of a public agency, not an input such as employment. The act of licensing involves the Medical Board (i.e. a "public agency") providing a license (i.e. providing a "service") to an applicant for a medical license. Although medical licensing does occur within the employment context, medical licensing is not equivalent to employment. The Medical Board does not make employment decisions, and the Board's grant of a license is not tantamount to a promise or guarantee of employment as a physician.

Furthermore, the magistrate judge's narrow construction of the phrase "services, programs, or activities" is at odds with the remedial goals underlying the ADA. *See Arnold v. United Parcel Serv., Inc.,* 136 F.3d 854, 861 (1st Cir. 1998) (observing that the ADA is a remedial statute which should be construed broadly); *Kornblau v. Dade County,* 86 F.3d 193, 194 (11th Cir. 1996) (same); *see also Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967) (recognizing the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"). Courts must construe the language of the ADA broadly in order to effectively implement the ADA's fundamental purpose of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Arnold,* 136 F.3d at 861 (quoting 42 U.S.C. § 12101(b)(1) (1994)). In fact, this court has already capitalized upon the opportunity to construe broadly the language of Title II. In *Lee v. City of Los Angeles* we stated in the Title II context that "the

ADA's broad language brings within its scope anything a public entity does." *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir. 2001) (citation and internal quotations omitted). Medical licensing is without a doubt something that the Medical Board "does." As such, we conclude that medical licensing clearly falls within the scope of Title II.[3]

The second major reason given by the magistrate judge for dismissing Dr. Hason's Title II claims was that Dr. Hason was not a "qualified individual with a disability" within the meaning of Title II of the ADA. Title II defines this requirement as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers,

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[3] Dr. Hason also argues that, regardless of whether a medical license constitutes a service, program, or activity of a public entity, his complaint states a claim under Title II of the ADA. As noted above, Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, *or be subjected to discrimination by any such entity.*" 42 U.S.C. § 12132 (emphasis added). Dr. Hason construes the second clause of Title II (i.e. "or be subjected to discrimination by any such entity") as providing a blanket cause of action for any type of discrimination by a public entity, including discrimination not related to the services, programs or activities of a public entity. Because we conclude that medical licensing is a service, program, or activity of a public entity within the meaning of Title II, we need not reach the merits of Dr. Hason's argument. For the sake of clarity, however, we note that in *Zimmerman* we ruled out Dr. Hason's proposed construction of the second clause of Title II. *See Zimmerman,* 170 F.3d at 1176 (concluding that the second clause of Title II, like the first, prohibits discrimination only in a public entity's outputs).

> or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Dr. Hason argues that the District Court erred in accepting the magistrate judge's conclusion because the question of whether Dr. Hason is a qualified individual with a disability is a factual question that should not be resolved on a 12(b)(6) motion to dismiss. In response, Appellees contend that Dr. Hason is not a "qualified individual with a disability" because Dr. Hason admits in his pleadings that he suffers from a mental disability.

Although at a later stage in the proceedings Appellees might demonstrate that Dr. Hason is not a qualified individual with a disability, they have not yet done so. Appellees are correct that Dr. Hason states in his complaint that he suffers from a mental disability. Dr. Hason's complaint also alleges, however, that by the time of the Medical Board's decision he had received treatment for his disability and was capable of practicing medicine. Accepting these allegations as true and construing them in the light most favorable to Dr. Hason, we conclude that Dr. Hason adequately alleges that he is a qualified individual with a disability. *See Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1989) (stating that, in reviewing district court's dismissal for failure to state a claim pursuant to Rule 12(b)(6), appellate court accepts plaintiff's allegations as true and construes complaint in light most favorable to plaintiff).

For the foregoing reasons, we conclude that Dr. Hason states claims for which relief can be granted under Title II

of the ADA. The District Court erred in dismissing his complaint pursuant to Rule 12(b)(6).

III. Failure to Prosecute

Dr. Hason next argues that the District Court abused its discretion in dismissing his claims, for failure to prosecute, against the individual defendants in their personal capacities. In recommending that Appellant's suit be dismissed for failure to prosecute, the magistrate judge relied on Federal Rule of Civil Procedure 4(m). Rule 4(m) provides that, if process is not served within 120 days after the filing of the complaint, and the plaintiff cannot show good cause why service was not made within that time, the action is subject to dismissal without prejudice upon the court's own initiative with notice to the plaintiff. The magistrate judge noted that Dr. Hason failed to effectuate service of process on the named individual defendants within 120 days after the filing of his complaint. Dr. Hason also failed to respond to an order to show cause why service had not been made within the 120 day period.

Dr. Hason does not dispute these facts. Rather, he argues that he had determined that the individual defendants were not liable and that he wanted them to be dismissed as defendants. He assumed that he was furthering this goal and helping the court by not responding to the order to show cause. However, when it became clear that the state agencies were going to be dismissed as defendants, Dr. Hason decided that he no longer wanted the individual defendants to be dismissed. Dr. Hason's argument lacks merit, and we conclude that the District Court did not abuse its discretion in dismissing, for failure

to prosecute, Dr. Hason's claims against the individual defendants in their personal capacities.

IV. Conclusion

In conclusion, we hold that (1) Dr. Hason's Title II claims are not barred by the Eleventh Amendment; (2) Dr. Hason's section 1983 claims seeking prospective injunctive relief against the individual defendants in their official capacities are not barred by the Eleventh Amendment; (3) Dr. Hason states valid claims under Title II of the ADA; and (4) the District Court did not abuse its discretion in dismissing for failure to prosecute Dr. Hason's claims against the individual defendants in their personal capacities.

We accordingly remand to the District Court for consideration of the merits of Dr. Hason's ADA claims. The District Court did not rule on the merits of Dr. Hason's section 1983 claims, so they too must be remanded.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, M.D., Plaintiff, vs. THE MEDICAL BOARD OF THE STATE OF CALIFORNIA, et al., Defendants.	Case No.: CV 99-04264-AHM (RNB) **JUDGMENT** (Entered April 27, 2000)

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that this action is dismissed without prejudice as to the individual defendants in their individual capacities, and with prejudice as to the two named state agencies and the individual defendants in their official capacities.

DATED: April 25, 2000

/s/ A. Howard Matz
A. HOWARD MATZ
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, M.D., Plaintiff, v. THE MEDICAL BOARD OF THE STATE OF CALIFORNIA, et al., Defendants.	Case No.: CV 99-04264-AHM (RNB) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (Filed Mar. 31, 2000)

Pursuant to 28 U.S.C. § 636, the Court has conducted a review of all the records and files of this case, including the Report and Recommendation of the United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a *de novo* determination of those portions of the Report and recommendation to which objection has been made, the Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

IT IS ORDERED that: (1) plaintiff's federal civil rights claims against the two named state agencies and the individual defendants in their official capacities are dismissed without leave to amend; (2) plaintiff's ADA claim is dismissed without leave to amend; and (3) plaintiff's state law tort claims are dismissed without leave to amend.

March 31, 2000

/s/ A. Howard Matz
A. HOWARD MATZ
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL J. HASON, M.D., Plaintiff, vs. THE MEDICAL BOARD OF THE STATE OF CALIFORNIA, et al., Defendants.	Case No. CV 99-04264-AHM (RNB) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable A. Howard Matz, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court or [sic] the Central District of California.

PROCEEDINGS

Plaintiff filed this action *pro per* on April 21, 1999, purporting to allege federal claims for violations of his federal constitutional rights and the Americans with Disabilities Act ("ADA"), as well as state law tort claims. Named as defendants are The Medical Board of the State of California (the "Medical Board"), the Department of Consumer Affairs of the State of California (the "Consumer Affairs Department") and its director, and various other individuals who are alleged to be either members of or otherwise affiliated with the Medical Board (in both their official and individual capacities).

Like two other actions filed by plaintiff in this Court, this action arises out of the Medical Board's denial of plaintiff's application for a medical license.

On December 23, 1999, the matter was transferred from the calendar of Magistrate Judge Nagle to the calendar of Magistrate Judge Block.

Now pending before the Court and ready for decision is a Motion to Dismiss brought by the State of California on behalf of the Medical Board and the Consumer Affairs Department. For the reasons discussed hereafter, the Court recommends that plaintiff's federal civil rights claims against the two named state agencies and the individual defendants in their official capacities be dismissed without leave to amend, that plaintiff's ADA claim be dismissed without leave to amend, and that plaintiff's state law tort claims be dismissed without leave to amend.

STANDARD OF REVIEW

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1988). Plaintiff's allegations of material fact must be taken as true and construed in the light most favorable to plaintiff. *See Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1989). Since plaintiff is appearing *pro se,* the Court must construe the allegations of the complaint liberally and must afford plaintiff the benefit of any doubt. *See Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988).

DISCUSSION

A. Plaintiff is unable to state a claim against the State of California (or the two named state agencies) or any of the individual defendants in their official capacities for violation of his federal civil rights.

In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), the Supreme Court held that states, state agencies, and state officials sued in their official capacities[1] are not persons subject to civil rights suits under 42 U.S.C. § 1983. *See* 491 U.S. at 64-66. Further, the Eleventh Amendment bars federal jurisdiction over suits by individuals against a State and its instrumentalities, unless either the State consents to waive its sovereign immunity or Congress abrogates it. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99-100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). To overcome this Eleventh Amendment bar, the State's consent or Congress' intent must be "unequivocally expressed." *Pennhurst,* 465 U.S. at 99. While California has consented to be sued in its own courts pursuant to the California Tort Claims act, such consent does not constitute consent to suit in federal court. *See BV Engineering v. Univ. of Cal., Los Angeles,* 858 F.2d 1394, 1396 (9th Cir. 1988), *cert. denied,* 489

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[1] The Supreme Court has held that an "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham,* 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); *see also Brandon v. Holt*, 469 U.S. 464, 471-72, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985); *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). Such a suit "is *not* a suit against the official personally, for the real party in interest is the entity." *Graham, supra.*

U.S. 1090 (1989); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) (holding that Art. III, § 5 of the California Constitution did not constitute a waiver of California's Eleventh Amendment immunity). Furthermore, Congress has not abrogated State sovereign immunity against suits under 42 U.S.C. § 1983.

The Eleventh Amendment not only bars plaintiff's federal civil rights claims against the State of California/Medical Board/Consumer Affairs Department and the named individuals in their official capacities to the extent that plaintiff is seeking monetary damages from them, but also plaintiff's federal civil rights claims against those defendants to the extent that plaintiff is seeking injunctive relief. *Pennhurst*, 465 U.S. at 100 ("This jurisdictional bar applies regardless of the nature of the relief sought."); *see also Alabama v. Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (per curiam) (Eleventh Amendment bars claim for injunctive relief against Alabama and its Board of Corrections).

Moreover, plaintiff's failure to allege facts sufficient to state a federal civil rights claim against the State of California/Medical Board/Consumer Affairs Department and the named individuals in their official capacities is not a pleading deficiency capable of being remedied in an amended pleading.

B. Plaintiff is unable to state a claim against defendants for violation of the ADA.

The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded

from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *See* 42 U.S.C. § 12132(2); *Weinreich v. Los Angeles County Metropolitan Transportation Authority*, 114 F.3d 976, 978 (9th Cir.), *cert. denied*, 118 S. Ct. 423 (1997); *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996). 42 U.S.C. § 12131(2) defines "qualified individual with a disability" in pertinent part as "an individual with a disability who, with or without reasonable modifications to rules, policies or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

The gravamen of plaintiff's ADA claim is that the State of California violated the ADA when it denied his medical license application on account of his mental disability. (Plaintiff acknowledges in his opposition that he "has suffered recurring depressions that have at times significantly impaired his ability to function in major activities of life.").

Plaintiff contends in his opposition that the Eleventh Amendment is not a bar to an action under the ADA. However, even assuming *arguendo* that plaintiff is correct,[2] plaintiff still has failed to cite any authority for the proposition that a medical license even qualifies as "services, programs, or activities of a public entity' within the meaning of the ADA. As the district court

[2] It appears that, by the end of the current term, the United States Supreme Court may hold otherwise.

observed in *Alexander v. Margolis*, 921 F. Supp. 482 (W.D. Mich. 1995), where the plaintiff's medical license had been revoked on account of plaintiff's mental condition:

> "Considering the test of section 12132(2), it is questionable whether the Board's duty to license physicians can be characterized as a 'service' being denied to plaintiff or whether the Board's refusal to reinstate his license denies him participation in 'programs or activities provided' by a state entity. The Board of Medicine is, if anything, a service, program or activity provided for the public's benefit and safety, not for the benefit of any given individual who does not meet the state's requirements for practicing medicine." 921 F. Supp. at 488.

In any event, even if a medical license qualifies as "services, programs, or activities of a public entity' within the meaning of the ADA, the Court concurs with the conclusion of the *Alexander* court that a medical license applicant who suffers from a mental disability is not a "qualified individual with a disability" under the ADA:

> "The very nature of the police powers exercised by state boards of medicine require the state to discriminate on the basis of, among other considerations, a mental condition harmful to the public's safety. By the very nature of the practice of medicine, given the physician's necessary independence to 'practice' his art, no reasonable modification can be made to a policy of restricting medical practice to those without evidence of mental disabilities. . . . The Board cannot exercise its duty without the discretion

> to consider the impact of a mental disability upon one's ability to practice with reasonable skill and safety. The danger of irreparable harm to the public is too great to deny the Board such discretion. To require otherwise is unreasonable." 921 F. Supp. at 488.

Moreover, it does not appear to the Court that plaintiff's failure to allege facts sufficient to state an ADA claim is a pleading deficiency capable of being remedied in an amended pleading.

C. Plaintiff's state law tort claims are barred by plaintiff's failure to comply with the claims presentation requirements.

To the extent that plaintiff purports to be alleging state law tort claims, his claims are subject to the provisions of the California Tort Claims Act (the "Act"). *See* Cal. Govt. Code §§ 900.6 (defining "State" to include "any office, officer, department, division, bureau, board, commission or agency of the State"), 905.2 (requiring tort claims for money or damages against the State to be presented in accordance with the provisions of the Act). Under Cal. Govt. Code § 911.2, it was incumbent on plaintiff to present his state tort claims against the state agencies and the individual defendants to the State Board of Control (*see* Cal. Govt. Code § 900.2) not later than six months after the accrual of his causes of action. In neither the Complaint nor his opposition to the Motion to Dismiss does plaintiff allege timely presentation of his state tort claims in accordance with Cal. Govt. Code § 911.2.

Since it appears from the face of the Complaint that plaintiff's state tort claims accrued no later than April 24, 1998, when plaintiff alleges that the Order affirming the denial of his license application took effect, not only is it now too late for plaintiff to present his claim, but it also is too late for him to seek leave to present a late claim. *See* Cal. Govt. Code § 911.4 (written application to present a late claim must be presented within a reasonable period of time not to exceed one year after the accrual of the cause of action). Therefore, under California law, plaintiff's state tort claims against defendants are now barred. *See, e.g., Boxall v. Sequoia Union High School Dist.,* 464 F. Supp. 1104, 1113 (N.D. Cal. 1979); *Fisher v. Pickens,* 225 Cal. App. 3d 708, 718, 275 Cal. Rptr. 487 (1990). Thus, plaintiff's failure to allege facts sufficient [to] state any state tort claims also is a pleading deficiency incapable of being remedies in an amended complaint.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) dismissing plaintiff's federal civil rights claims against the two named state agencies and the individual defendants in their official capacities without leave to amend; (3) dismissing plaintiff's ADA claim without leave to amend; and (4) dismissing plaintiff's state law tort claims without leave to amend.

DATED: February 1, 2000

/s/ Robert N. Block
ROBERT N. BLOCK
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL J. HASON, M.D.,

Plaintiff-Appellant,

v.

MEDICAL BOARD OF CALIFORNIA; DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA; ARLENE ADAMS, the Director of the Department of Consumer Affairs of the State of California; NEIL FIPPIN, individually, & as the Manager, Licensing Program of the Medical Board of the State of California; MELINDA ACOSTA, individually & as an official of the Medical Board of the State of California; RON JOSEPH, individually & as Executive Director of the Medical Board of the State of California & as Director of the Department of Consumer Affairs of the State of California; BRUCE HASENKAMP, individually & as President of the Division of Licensing of the Medical Board of the State of California; IRA LUBELL, M.D., individually & as President of the Division of Medical Quality of the Medical Board of the State of California; CAROLE H. HURVITZ; ANABEL A. IMBERT; RAQUEL D. ARIAS, Dr.; KLEA D. BERTAKIS, Dr.; JACK BRUNER, DR.; DANIEL LIVINGSTON; KAREN MCELLIOT; ALAN E. SCHUMACHER, Dr.; KIP S. SKIDMORE, individually & as Member of the Medical Board of the State of California's Division of Medical Quality; THOMAS A. JOAS, Dr.; KAREN MCELLIOTT, individually & as Officer of the Medical Board of the State of California & its Division of Licensing; BERNARD ALPERT, individually & as Officer of the Medical Board of the State of California & its Division of Licensing; MICHAEL I. SIDLEY, individually & as Executive of the Medical Board of the State of California's Division of

Licensing; RAJA TOKE, Dr., individually & as Executive of the Medical Board of the State of California's Division of Licensing; THE STATE OF CALIFORNIA & SENIOR INVESTIGATOR,
Defendants-Appellees.

No. 00-55980.

Filed June 26, 2002
Before: Alfred T. Goodwin, J. Clifford Wallace and Sidney R. Thomas, Circuit Judges.

Dissent by Judge O'Scannlain

ORDER

Judge Thomas has voted to deny the petition for rehearing en banc, and Judges Goodwin and Wallace recommended denial.

The full court has been advised of the petition for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

O'SCANNLAIN, Circuit Judge, with whom Circuit Judges KOZINSKI, T.G. NELSON, and KLEINFELD join, dissenting from denial of rehearing en banc.

Stubbornly extending enforcement of Title II of the Americans with Disabilities Act ("ADA") against the Nine Western States, today's opinion blithely ignores recent Supreme Court precedent and follows superseded cases of our court instead. It bears repeating: This decision cannot possibly ~~be right~~. *See Vinson v. Thomas,* 288 F.3d 1145, 1157-58 (9th Cir. 2002) (O'Scannlain, J., dissenting); *see*

also Douglas v. Cal. Dep't of Youth Auth., 285 F.3d 1226, 1226-27 (9th Cir. 2002) (O'Scannlain, J., dissenting from denial of rehearing en banc). Because *Hason* all but invites a grant of certiorari and reversal for putting us out of step with the Supreme Court *and creating a split with every other circuit to have considered the issue,* I must dissent from the order denying en banc rehearing.

I

This opinion reaffirms two prior decisions of this court – *Dare v. California,* 191 F.3d 1167 (9th Cir. 1999), and *Clark v. California,* 123 F.3d 1267 (9th Cir. 1997) – which concluded that Title II validly abrogated the sovereign immunity of the several States. *See Hason v. Med. Bd.*, 279 F.3d 1167, 1170-71 (9th Cir. 2002). In so doing, however, it refuses to deal in a meaningful way with intervening Supreme Court precedent, specifically *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001). This, in a nutshell, is where *Hason* goes astray.

A bit of history is required to see clearly the misstep that this opinion takes.

A

It is beyond dispute that recent decisions of the Supreme Court, including *Garrett,* have fundamentally changed the landscape of Eleventh Amendment jurisprudence. *See, e.g.,* William A. Fletcher, *The Eleventh Amendment: Unfinished Business,* 75 Notre Dame L. Rev. 843, 843-44 (2000). *Garrett* in particular clarified, in extensive detail, the approach that a court must take when addressing a claim that the ADA validly abrogated State sovereign immunity pursuant to section 5 of the

Fourteenth Amendment.[1] *Garrett* drew on *City of Boerne v. Flores,* 521 U.S. 507 (1997), which made clear that it was up to the courts to "define the substance of [the] constitutional guarantee[ ]" that Congress purported to enforce, *Garrett,* 531 U.S. at 365 (citing *Boerne,* 521 U.S. at 519-24), and that "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" *id.* (citing *Boerne,* 521 U.S. at 520). But *Garrett* also elaborated on the *Boerne* analysis. For instance, *Garrett* made clear that once a court has "determined the metes and bounds of the constitutional right in question," it must examine "whether Congress identified a history and pattern of unconstitutional . . . discrimination *by the States* against the disabled." *Garrett,* 531 U.S. at 368 (emphasis added). A showing of discrimination against the disabled in general, or discrimination by local governments rather than the States themselves, will not do. *Id.* at 368 ("Just as § 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress' § 5 authority is appropriately exercised only in response to state transgressions."); *id.* at 368-69 (explaining that "[i]t would make no sense to consider constitutional violations on" the

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[1] To be more precise, in *Garrett* the Court explicitly addressed only the question of whether Title I of the ADA, 42 U.S.C. § 12111 *et seq.,* which prohibits discrimination against the disabled with regard to employment, validly abrogated the States' sovereign immunity. It did not address whether Title II, 42 U.S.C. § 12131 *et seq.,* which prohibits discrimination against the disabled by public entities, did so. *Garrett,* 531 U.S. at 360 n.1. As I will explain in due course, however, it is the approach set forth in *Garrett,* rather than any specific teachings about Title I or Title II, which is crucial for purposes of my analysis.

part of local governments "when only the States are the beneficiaries of the Eleventh Amendment").

Moreover, *Garrett* makes clear that generalizations about disability discrimination and how the ADA is designed to remedy it are inadequate; instead, a court must "dissect[ ] the statutory regime in question and carefully compare[ ] it to the baseline definition of constitutional action under the Fourteenth Amendment." *Reickenbacker v. Foster,* 274 F.3d 974, 981 (5th Cir. 2001). Indeed, "*Garrett* specifically focused on the burdens of proof, exceptions, and defenses available in Title I of the ADA in order to find that 'the rights and remedies created by the ADA against the States raise the same sort of concerns as to congruence and proportionality as were found in [*Boerne*].'" *Id.*

B

Garrett, then, refined the abrogation inquiry set out in *Boerne.* Regrettably, however, both cases on which *Hason* relies – *Clark* and *Dare* – were handed down before *Garrett* was decided. Accordingly, they do not undertake the searching inquiry that *Garrett* requires.

1

In *Clark,* we concluded that the ADA, as a whole, validly abrogated the States' sovereign immunity.[2] We first

[2] The claims at issue in *Clark* were brought under Title II, but we treated the ADA as a whole. This casts further doubt on the continued validity of the opinion because in *Garrett,* the Court expressly refused

(Continued on following page)

recognized, correctly, that in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Supreme Court "held that the disabled are protected against discrimination by the Equal Protection Clause." *Clark,* 123 F.3d at 1270. But from there the analysis went astray, at least as seen in hindsight through the lens of *Garrett.* Reading the ADA at its most general level, we next observed that the purpose of the ADA was "to prohibit discrimination against the disabled," *id.,* and that "Congress explicitly found that persons with disabilities have suffered discrimination," *id.* Consequently, we decided that the ADA was "within the scope of appropriate legislation under the Equal Protection Clause as defined by the Supreme Court," *id.,* and added as a general afterthought that the Act does not "provide[ ] remedies so sweeping that they exceed the harms that they are designed to redress." *Id.* We therefore concluded that the ADA was "validly enacted under the Fourteenth Amendment." *Id.*

This minimalist analysis is a far cry from the detailed approach mandated by *Garrett;* its infirmities are manifest. It is devoid of *any discussion whatsoever* of legislative findings of discrimination *by States* – and specifically, by *States* rather than by *local governments.* Nor does it analyze any of the specific provisions of Title II to arrive at its sweeping conclusion that Title II does not provide remedies so sweeping that they exceed the harms that they are designed to redress – let alone does it "lay them next to the baseline of what defines constitutional state action under the Fourteenth Amendment," *Reickenbacker,*

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to conflate the separate, detailed inquiries required for each of Title I and Title II. *See Garrett,* 531 U.S. at 360 n.1.

274 F.3d at 981, or "dissect[ ] the statutory regime in question and carefully compare[ ] it to the baseline definition of constitutional action under the Fourteenth Amendment," *id.*, as *Garrett* requires.[3]

2

In *Dare,* we attempted to square *Clark's* result with the Supreme Court's intervening decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* 527 U.S. 627 (1999). But *Dare's* approach is no more sound than *Clark's.* Like *Clark's, Dare's* congruence analysis deals with legislative findings only of discrimination generally – not of discrimination *by States. See Dare,* 191 F.3d at 1174 ("When it enacted the ADA, Congress made specific factual findings of arbitrary and invidious discrimination against the disabled. On the basis of these findings, Congress concluded that the ADA was a necessary legislative response to a long history of arbitrary and irrational discrimination against people with disabilities.") (citation omitted). *Dare's* proportionality

[3] For a recent example of how a court might perform this detailed analysis in light of *Garrett,* parsing the legislative history of Title II and measuring its provisions against identified instances of discrimination against the disabled by States, *see Panzardi-Santiago v. University of Puerto Rico,* ___ F. Supp. 2d ___, No. Civ. 95-2316, 2002 WL 638533 (D.P.R. Mar. 19, 2002) (Delgado-Colon, Magistrate J.). This careful analysis led Magistrate Judge Delgado-Colon to conclude that "[t]he legislative history of the statute, particularly as to Title II, suffers from the same deficiencies identified by the Supreme Court in *Kimel* [*v. Florida Board of Regents,* 528 U.S. 62 (2000)] and *Garrett.*" *Id.* at *10; *see also id.* at *11 (concluding that "Congress exceeded its authority in abrogating the States' Eleventh Amendment immunity in suits brought pursuant to Title II of the ADA").

analysis is even less tenable, if one can call it an analysis at all:

> Having established the ADA's congruence with Congress's power to enforce the Equal Protection Clause, we turn to proportionality. In so doing, we reiterate the importance of deference to Congress in this analysis. The Supreme Court has specifically found protections for people with disabilities to be an area in which Congressional judgment should be given great deference. *See* [*Cleburne,* 473 U.S. at 442-43]. The ADA is thus an appropriate exercise of § 5 powers if Congress enacted it in response to a widespread problem of unconstitutional discrimination that includes state programs and services and if the ADA's provisions are proportional to the scope of that discrimination.
>
> As noted above, Congress made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face. *See* 42 U.S.C. § 12101(a). The ADA's particular provisions for each sector then indicate specifically the discrimination which is forbidden and the conduct needed to remedy the discrimination. *See* 42 U.S.C. § 12101 *et seq.* Although Title II's provisions may prohibit some State conduct which would pass muster under rational basis review, the Title's focus is on eliminating the discrimination outlined in the factual findings.

Id. at 1175 (footnotes omitted). Again, this sort of blanket generalization, coupled this time with a generous helping of deference to Congress, stands in stark contrast to the provision-by-provision comparison with the constitutional baseline that *Garrett* requires.

II.

In light of *Garrett,* then, it is clear that our pre-*Garrett* Title II precedents are outdated. Yet *Hason* refuses to acknowledge this. The discussion in the opinion dealing with abrogation is short; indeed, it comprises all of two paragraphs. *See Hason,* 279 F.3d at 1170-71. It can be summarized as follows: (1) *Clark* and *Dare* held Title II validly abrogated sovereign immunity; (2) *Garrett* did not expressly deal with Title II; it dealt only with Title I, and reserved judgment on Title II; *ergo* (3) *Clark* and *Dare* are good law.

This logic breaks down between steps (2) and (3). To be sure, in *Garrett* the Court expressly declined to decide whether Congress validly abrogated state sovereign immunity in enacting Title II of the ADA. *See Garrett,* 531 U.S. at 360 n.1. But it does *not* follow that because *Garrett* did not invalidate Title II, our prior case law upholding it remains relevant. For it is not just the *holding* of *Garrett* that matters; we must also be mindful of the *approach* the Court set forth there. As the foregoing analysis makes clear, the blunt approach taken in *Clark* and *Dare* has now been supplanted with a new, more nuanced inquiry. If we are to follow *Garrett* faithfully, we must re-analyze our prior precedents accordingly.

Two of our sister circuits have already recognized as much, and have re-analyzed *their* pre-*Garrett* precedents holding that Title II validly abrogated States' sovereign immunity. Each has concluded that Title II did not abrogate sovereign immunity – old circuit precedents to the contrary notwithstanding. *See Reickenbacker,* 274 F.3d at 981 (concluding that *Garrett* "effectively overruled" prior circuit precedent holding that Title II validly abrogated

State sovereign immunity); *Thompson v. Colorado,* 278 F.3d 1020, 1034 (10th Cir. 2001), *cert. denied,* ___ S. Ct. ___, 2002 WL 83622 (U.S. May 20, 2002).

Indeed, *Hason's* holding, that Title II validly abrogated States' sovereign immunity, period, splits us from seven of our peers that have considered the issue in the post-*Garrett* world. *Every one,* besides us, has gotten the message that something more nuanced is required; we now stand alone. *See Klingler v. Dir., Dep't of Revenue,* 281 F.3d 776, 777 (8th Cir. 2002) (affirming pre-*Garrett* decision holding that Title II did not validly abrogate State sovereign immunity); *Reickenbacker,* 274 F.3d at 983; *Thompson,* 278 F.3d at 1034; *Erickson v. Bd. of Governors of State Colls. and Univs.,* 207 F.3d 945, 948 (7th Cir. 2000) (questioning the continued authority of *Crawford v. Indiana Department of Corrections,* 115 F.3d 481, 487 (7th Cir. 1997), which upheld Title II as a valid abrogation of State sovereign immunity), *cert. denied,* 531 U.S. 1190 (2001); *see also Popovich v. Cuyahoga County Court of Common Pleas,* 276 F.3d 808, 812, 815-16 (6th Cir. 2002) (en banc) (agreeing that Title II is not a valid abrogation of sovereign immunity when Congress is enforcing the Equal Protection Clause, but holding that it is permissible when enforcing the Due Process Clause); *Garcia v. S.U.N.Y. Health Scis. Center,* 280 F.3d 98, 110-12 (2d Cir. 2001) (holding that Title II actions may only be brought against States if the plaintiff can establish that the "violation was motivated by discriminatory animus or ill will based on the plaintiff's disability"); *cf. Brown v. N.C. Div. of Motor Vehicles,* 166 F.3d 698, 707 (4th Cir. 1999) (holding that a regulation enacted pursuant to Title II did not validly abrogate State sovereign immunity).

III

Clark and *Dare* have gone the way of the dodo bird and the wooly mammoth, overtaken and relegated to extinction by the course of events. "*Clark* is now outdated – and *Douglas* wrong – for failing to recognize the change in the legal landscape of sovereign immunity." *Douglas,* 285 F.3d at 1226-27 (O'Scannlain, J., dissenting from denial of rehearing en banc). As every circuit to have analyzed the issue now agrees (except, of course, ours), in light of *Garrett,* Title II did not abrogate the Eleventh Amendment immunity of the several States.

We should have taken *Hason* en banc to reconsider, and to overrule, *Clark* and *Dare*. I respectfully dissent.

APPENDIX F

Michael J. Hason, M.D.
Plaintiff in pro per
1710 NW 87 Ave.
Plantation, FL 3322 [sic]
(954) 424-4082

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Michael J. Hason, M.D.,

Plaintiff, in pro per,

v.

The Medical Board of the State of California; Dept. of Consumer Affairs of the State of California; Arlene Adams, the Director of the Dept. of Consumer Affairs of the State of California; Neil Fippin, Individually and as the Manager, Licensing Program of the Medical Board of the State of California; Melinda Acosta, Individually and as an official of the Medical Board of the State of California; Ron Joseph, Individually and as Executive Director of the Medical Board of the State of California and as Director of the Dept. of Consumer Affairs of the State of California; Bruce Hasenkamp, Individually and as President of the Division of

COMPLAINT
and Jury Demand

Licensing of the Medical Board of the State of California; Dr. Ira Lubell, Individually and as Pres. of the Division of Medical Quality of the Medical Board of the State of California; Dr. Carole H. Hurvitz, Dr. Anabel A. Imbert, Dr. Raquel D. Arias, Dr. Klea D. Bertakis, Dr. Jack Bruner, Daniel Livingston, Karen McElliott, Dr. Alan E Schumacher and Kip S. Skidmore, Individually and as Members of the Medical Board of the State of California's Division of Medical Quality; Dr. Thomas A. Joas, Karen McElliott and Bernard Alpert, Individually and as Officers of the Medical Board of the State of California and its Div. of Licensing Michael I. Sidley and Dr. Raja Toke, Individually and as Executives of the Medical Board of the State of California's Division of Licensing; the State of California; and Senior Investigator, Medical Board of California,

Defendants

Background

1. The Plaintiff, Dr. Michael J. Hason, applied for a license to practice medicine in the State of California in the Spring of 1995. In August of 1996, the Medical Board of the State of California (MBSC) denied Dr. Hason's application, citing mental illness and an act that would require the suspension or revocation of a licensed

physician's license to practice medicine in the State of California. After appeal, the service of a Statement of Issues and a hearing the MBSC affirmed its decision in 1998. It's Order was stayed for approximately one month for consideration of Plaintiff's Petition for Reconsideration, which was denied. The Order took effect on about April 24, 1998.

2. This Court has jurisdiction over the within case due to diversity of citizenship and because the suit is based upon federal statutes, including but not limited to the Civil Rights Statutes 42 U.S.C. 1980-88, the Americans with Disabilities Act, the Rehabilitation Act, if applicable, the Constitution of the United States of America, including but not limited to the due process clause and the equal protection clauses of the 14th Amendment, the privileges and immunities clauses and the 13th Amendment, if applicable, and the statutes and Constitution of the State of California, as applicable.

As and for a First Cause of Action

3. The Defendants proceeded under statutes which were violative of the Constitution of the United States and that of the State of California, including, but not limited to their use and application of a vague and overbroad State statute that targeted applicants and physician licensees who were described in the licensing statute as mentally ill, where this group also included physicians who had a history of mental illness and who were not actively mentally ill, or who were actively mentally ill, but able to practice medicine safely anyway.

4. All or many of these individuals and/or Dr. Hason were targeted for increased scrutiny and investigation

which promoted the exclusion of these physicians from the practice of medicine in the State of California, regardless of their ability to practice medicine safely or the fact that they were otherwise qualified.

5. The statutes on their face and as applied are unconstitutional, should be declared void and all decisions had under them should be declared void and of no effect, including and particularly, decisions regarding the license application of Dr. Hason, such as decisions made by Defendants August 1996 and April 1998 denying Dr. Hason's application for a medical license.

6. The statutes referred to include, but are not limited to the statute that states that a license to practice medicine may be denied for the reason of mental illness.

As and for a Second Cause of Action

7. The Plaintiff repeats the allegations numbered 1-3, as if more fully set forth here. The Defendants violated the Plaintiff's rights under the Americans with Disabilities Act by illegally and invasively requesting that he provide to them all medical records concerning his history of treatment for depression which extended back to the year 1970.

8. The Defendants further violated Plaintiff's rights under the ADA by not properly applying the "direct threat" standard enunciated by the EEOC and Justice Dept. as the proper standard to find that a license applicant is a danger to his prospective patients or others. The Defendants did this throughout the application proceedings, including, but not limited to, their initial decision in Aug. 1996, their behavior after getting input from Dr.

David Glaser, their behavior after getting input from Florida from Dr. Robert Perovich and Mr. David Molko, M.S.W., and did so by adopting the administrative Judge's decision which did not properly apply this standard. The Defendants did not properly apply the standard in considering the Plaintiff's Petition for Reconsideration as that Petition established Plaintiff's readiness to practice medicine safely and identified many irregularities in the proceedings had against Dr. Hason by the MBSC and its agents.

9. The Defendants violated the ADA by not accommodating Plaintiff by offering him a probationary medical license, conditioned on his agreement and actual cooperation with some supervising physician and/or psychiatrist and/or psychotherapist for psychotherapy, guidance and/or other supervision, as needed, reasonable and legal.

As for a Third Cause of Action

10. The Plaintiff repeats allegations numbered 1-9, as if more fully set forth here. Apparently, after receipt of Plaintiff's medical record from 1992 hospitalization in Philadelphia, an executive of the Medical Board recklessly determined and stated in writing that the Plaintiff was a "narcissistic jerk," and stated that the Medical Board of the State of California (MBSC) should seek a psychiatric evaluation of Plaintiff in order to block his application's viability, thus biasing all further proceedings and destroying their objectivity. On information and belief, this document was also published to Dr. Michael Meek, prejudicing that consultant's initial mindset and biasing his ultimate opinions later expressed in his report to the

MBSC about the summer of 1996 and in his testimony during Sept. and Oct. 1997.

As for a Fourth Cause of Action

11. The Plaintiff repeats allegations numbered 1-5, as if more fully set forth here. Plaintiff was directed to pay MBSC $2000.00 as a charge for the evaluation by their psychiatric consultant, Dr. Michael Meek (Meek), which fee was calculated to illegally exclude the Plaintiff from the practice of medicine in California.

As for a Fifth Cause of Action

12. The MBSC and Defendants intentionally and/or recklessly hired an unqualified and biased psychiatrist to evaluate the Plaintiff.

13. Further, the MBSC specifically encouraged the bias of the psychiatrist Meek, conspiring with him, by showing him the written statement of the MBSC official who had stated that the Plaintiff was a "narcissistic jerk." Further, they controlled and biased the psychiatrist's perceptions and conclusions by paying him only in cases where he filed a negative report. Thus, they made it perfectly clear to Meek that they sought negative reports on physicians referred to him for evaluation and/or on Dr. Hason and not fair and objective evaluations. These actions and the conspiracy among the Defendants impaired Plaintiff's rights to a fair psychiatric evaluation and prejudiced beyond repair the objective consideration of Plaintiff's application for a medical license.

As for a Sixth Cause of Action

14. The Plaintiff repeats allegations 1-13, as if more fully set forth here. Despite the unqualified Psychiatrist's finding that the Plaintiff's mental status was essentially normal, and despite the Plaintiff's score of normal on the highly respected MMPI psychological test, the MBSC and other Defendants accepted the Psychiatrist's trumped up conclusions and false recitation of facts regarding Plaintiff. These facts included, but were not limited to 1) the psychiatrist Meek's claim that the Plaintiff abandoned his patients when he was a resident at the State University of New York at Stony Brook during 1993-94 and 2) was absent without leave for an extended period of time from his residency post at Stony Brook in about May of 1994 and just inexplicably turned up at a hotel in New Orleans, were patently false, calculated to obstruct justice and could have easily been checked out by Meek or the MBSC, or the Defendants. They intentionally and recklessly did not do so, even after Plaintiff's refutation, pleadings, explanations and denials under oath in Sept. 1997. The Defendants recklessly continued to use these bogus facts in an attempt to paint the Plaintiff as a dangerous physician and confuse and mislead the Administrative Judge assigned to Plaintiff's case.

15. The Defendants also accepted their psychiatrist Meek's bogus diagnosis for Plaintiff of narcissistic personality disorder on the basis of totally inadequate evidence and were reckless in their use of this bogus diagnosis to trump up a case against Plaintiff.

16. Similarly, they adopted and promoted a bogus diagnosis of multiple drug dependency authored by Dr. Meek,

despite clear evidence of the incorrectness of this diagnosis.

17. The Defendants also acted improperly by adopting the results of the inappropriately administered personality test named for its creator Dr. Millon and countenanced the exaggerated used [sic] of this unreliable data, by adopting Meek's stretch of narcissistic trait score on the test into a diagnosis of a full blown personality disorder.

18. The Defendants also countenanced Meek's numerous exaggerations, fabrications, wild illogical conclusions and accusations, including, but not limited to, those presented as evidence of "bias" in the Closing Statement of Plaintiff's attorney, Ms. Kollar, incorporated here as if more fully set forth, and those presented by Plaintiff in his Petition for Reconsideration, incorporated here, as if more fully set forth.

As for a Sixth [sic] Cause of Action

19. The Plaintiff repeats allegations numbered 1-18, as if more fully set forth here. After receiving Plaintiff's notice of appeal MBSC and Defendants drew up a Statement of Issues that included a bogus charge relating to the claim that the Plaintiff was mentally ill.

20. They did not serve it upon the Plaintiff until months after the proper time for service.

21. Further, they included a second charge based on Plaintiff's failure to include his attendance at a residency at the Graduate Hospital in Aug.-Oct. 1992. They did this, after Plaintiff fully cooperated with them, giving them information about his attendance at the Hospital, which included positive statements by one Elliot Nierman,

Program Director, which showed that Plaintiff had not failed to present information that was material to the question of whether he was entitled to a license to practice medicine in California.

22. Further, they rejected positive evaluations and certifications that Dr. Hason was safe, from two Board Certified psychiatrists, Dr. David Glaser and later Dr. Robert Perovich, both of whom, had enjoyed an extended opportunity to evaluate Dr. Hason for his ability to practice medicine safely.

As for a Seventh Cause of Action

23. The Defendants also delayed the scheduling of the administrative hearing on appeal well beyond the 90 day limit of the relevant statute, did not apply to the Administrative Hearings Division or Judge for statutorily permitted extensions of time for good reasons shown and scheduled the hearing beyond the date permitted even by the maximum number of permitted extensions.

As for a [sic] Eighth Cause of Action

24. At Plaintiff's hearing on the appeal in the Fall of 1997, Defendants made many false and misleading assertions against the Plaintiff, in bad faith, regarding facts that were false and that could easily have been verified and found to be false and which also included many trumped up exaggerations obstructing justice. Thus, they provided the Administrative Law Judge with a confused and spurious database and a difficult decision concerning the safety of granting a license to Dr. Hason.

25. To repeat, they failed to properly investigate the facts that they relied upon and took no proper action to re-evaluate their data, once they were pointedly alerted to the falsity of their data by Dr. Hason's sworn testimony at the hearing, by the questions of Ms. Kollar, Dr. Hason's attorney and by other more obvious inconsistencies and patent absurdities, promoted for them by Meek.

26. They intentionally and recklessly ignored the facts that Dr. Hason had worked as a physician caring for approximately 500 patients, without suffering any substantiated charge of negligence, or suffering any accusation of depression, narcissism or hypomania by his supervising physicians at St. Vincent's Hospital, Bridgeport, CT, 1991-92, SUNY at Stony Brook, 1993-94 or at the VA Medical Center, W. Los Angeles, 1994-95. They further ignored the fact that on the occasions when Dr. Hason did work as a physician, while actually depressed, no supervisor accused him of any act of negligence.

27. By not weighing these facts, the Defendants did not obey the dictates of the ADA which required that they find and prove that Dr. Hason posed a "direct threat" to the health and safety of his prospective patients or others. If the Defendants still were justifiably concerned, they failed to accommodate Plaintiff as required by the ADA

As for and [sic] Ninth Cause of Action

28. The Plaintiff repeats allegations numbered 1-27, as if set forth here more fully. The Defendants, further, abused their discretion by failing to properly evaluate, investigate and articulate a written or reasonable decision, with regard to the information advanced by Dr. Hason in his Petition for Reconsideration, including but not limited to

the information that Dr. Hason had not abandoned any patients while at Stony brook, was well and ready to practice medicine in California safely and that he was agreeable to and felt that an accommodation, such as a probationary license, was appropriate.

29. MBSC and Defendants refused to seriously consider psychiatric updates from Dr. Perovich, a board certified psychiatrist and David Molko, M.S.W., both of whom had treated and observed Dr. Hason for more than six months by the time that the Petition was being reviewed by MBSC and Defendants. Further, the statements by these health professionals made it clear that Dr. Hason was following the health maintenance suggestions of the Defendants and was stable and highly likely to remain in treatment, as long as necessary (and continue to benefit from the therapy) all in accord with what the Defendants had indicated was good and necessary for the safe practice of medicine by Dr. Hason.

30. Those two professionals, Dr. Perovich and Mr. Mc'ko, were continuing to treat Dr. Hason again in line with the Defendants expressed suggestions and original reservations to licensing. The mental health experts, both filed very positive reports, certifying again Dr. Hason's safety to practice medicine based on an even longer period of examination. They also made statements evidencing their serious reservations about the conclusions of the MBSC's psychiatrist Dr. Meek, which apparently the Defendants did not consider appropriately and which did not prompt any further serious consideration of the situation fostered by the acts of Defendants. Once again, the two health professionals recertified to the Defendants that Dr. Hason was stable and safe to practice medicine. All of this was ignored intentionally, because of the MBSC's bias and

invidious discriminatory inclinations regarding Dr. Hason, whom they accused of mental illness and being unsafe to practice medicine in the State of California to cover their invidious subjective discriminatory biases against him for having had a history of depression and other factors like his leaving out the Graduate Hospital from his application and their receipt of certain phony accusations by Dr. Davis of SUNY at Stony Brook and because of the false and deceptive acts and behavior of Meek, i.e., they used this accusation of mental illness as a trumped up mechanism to block Dr. Hason's application when, in reality, they chose to deny the license on illegal and hidden bases, denying Dr. Hason the equal protection of the laws.

As and for a Ninth Cause of Action

31. The Plaintiff repeats the allegations numbered 1-30, as if more fully set forth here. The Defendants violated Plaintiff's right to a fair and speedy hearing under the relevant statutory 90 day period within which they must hold a [sic] such a hearing to decide Plaintiff's appeal. This period began to run after Plaintiff's appeal from Defendants' initial decision of August, 1996 denying Plaintiff's application for a medical license.

As and for a Tenth Cause of Action

32. The Plaintiff repeats the allegations numbered 1-33, as if more fully set forth here. The Defendants informed Dr. Hason that his license had been denied for two reasons, mental illness and his doing of an act that would cause the MBSC to suspend or revoke the license of a physician already licensed in California. They failed to explain to the Plaintiff how he was mentally ill. They

failed to tell Dr. Hason what act he had done that they were relying upon. They thus severely intruded on Dr. Hason's due process rights and ability to decide upon whether to appeal and how he could defend himself.

As for an Eleventh Cause of Action

33. The Plaintiff repeats allegations numbered 1-32, as if more fully set forth here. The bare bones denial of license served in August, 1996 was also calculated to intentionally inflict emotional distress, was outrageous and did cause Plaintiff to suffer severe emotional and ultimately consequential emotion or stress induced and other physical injury.

As for a Twelfth Cause of Action

34. The Plaintiff repeats allegations numbered 1-33, as if more fully set forth here. The Defendants proceeded on a Statement of Issues that included charges relating to mental illness that were bogus and unworthy of serious legal consideration. The Defendants failed to state an actionable cause for license denial in the acceptable domain of mental illness reasons for denial. They trumped up some tale about how Plaintiff had a narcissistic personality disorder, had been depressed in the past and would not seek treatment if he got depressed, because the narcissistic personality disorder would prevent him from understanding that he needed treatment to hide illegal or no proper bases to deny Dr. Hason a license.

35. They also relied on a second charge based on the failure of the Plaintiff to include some data about the Graduate Hospital, that was essentially collateral to the necessary determination of Plaintiff's fitness to practice

medicine safely in California, after Plaintiff had cooperated fully with them in the production of information relating to his training at the Graduate Hospital.

As for a Thirteenth Cause of Action

36. The Plaintiff repeats the allegations numbered 1-35, as if more fully set forth here. The Defendants acted in violations of 42 U.S. Code 1981-88, et seq., by acting under the color of state law and doing the many acts referred to in this Complaint which were intended to deprive the Plaintiff of his rights protected under the Constitution and the Statutes of the United States of America as well as the Constitution and Statutes of the State of California. The actions of the Defendants violated the Plaintiff's liberty rights by preventing him from choosing and working in the profession of his choice, obtaining the proper license and living and working in the State of his choice after recent entry into the State of California.

37. They also violated his due process rights by making an adversarial game and using lies and distortions instead of a fair and proper evaluation of Plaintiff's skills, abilities, mental condition and shortcomings.

38. They violated his equal protection rights by treating Plaintiff unlike others similarly situated with a history of mental illness and no recent active illness and/or those with mental illness who were still safe to practice medicine, by doing all of the acts mentioned herein calculated to make anyone with a history of mental illness and/or Dr. Hason particularly, or with mental illness but safe to practice medicine, despite the illness, look as if they were unsafe and that no reasonable accommodation or agreement or adjustment could make them safe.

As for a Thirteenth Cause of Action

39. The Plaintiff repeats each allegations [sic] numbered 1-38, as if more fully set forth here. The Defendants violated Plaintiff's rights under the Privileges and Immunities Clause of of [sic] the United States Constitution that protects the right of citizens to travel between States and to live in any State with the same rights as its other citizens including, but not limited to, living and working in one's chosen profession, obtaining necessary licenses from the government, having a family and supporting it through paid work as a physician, licensed or otherwise and thus the Defendants also violated Dr. Hason's rights and/or violated similar rights of others similarly situated with Dr. Hason with regards to his recent entry into the State and/or that factor in combination of Dr. Hason's memberships in the class of those with a history of mental illness. They violated the Privileges and Immunities Clause of the United States Constitution by treating Plaintiff differently than other residents of the State of California, by preventing him from working in the State of California as a physician, the profession which he had chosen and in which he was qualified legally, and by harming him in further ways as elaborated in this Complaint and by constructively or literally driving him out of the State of California. They did this for the reasons already mentioned concerning their biases about mental illness and their hidden agenda other than a valid belief in Dr. Hason's actual mental illness or proper evidence thereof and painted Dr. Hason as mentally ill and unsafe because Plaintiff was an "outsider," an individual recently arrived from New York State and a person whom they wished to drive from their State and following the lead of Meek, from medicine entirely.

As and for a Fourteenth Cause of Action

40. The Plaintiff repeats each allegation numbered 1-39, as if more fully set forth here. The Defendants violated Plaintiff's rights by violating his rights under the 13th Amendment of the constitution of the United States of America by attempting to create a class of slaves including the mentally ill who were able to function safely in professional positions and those with a history of mental illness. The Plaintiff was a member of this class. This class of slaves, including Dr. Hason, was deemed unable to work as a freeman [sic] who could chose their profession and seek business among the populace. Dr. Hason was treated as someone who would not be allowed to provide for himself, not be allowed to have a family which he could support and would be told how he was to care for his own health and was told not to contribute to decisions that others would make about how he should care for his health, which were a further violation of Plaintiff's liberty.

As and for a Fifteenth Cause of Action

41. The Plaintiff repeats each allegation numbered 1 through 40, as if more fully set forth here. The Defendants violated Plaintiff's rights under the State of California's Constitution and statutes, including but not limited to those clauses protecting the Plaintiff's right to pursue and obtain happiness, work, reputation, possessions with free enjoyment thereof, and to do so under conditions of liberty, due process and the equal protection of the laws. They also violated California's statutory declaration of the right to equal protection in employment for all individuals "otherwise qualified."

As and for an [sic] Sixteenth Cause of Action

42. The Plaintiff repeats each allegation numbered 1 through 41, as if more fully set forth here. The Defendants violated the Plaintiff's rights by invading his privacy as prohibited by the due process clause of the Constitution of the United States, 14th Amendment, substantively, by acts including, but not limited to, requesting all of Plaintiff's medical records relating to psychotherapeutic treatment and treatment for depression, by directing him to appear for an examination by a psychiatrist, by choosing a biased and unqualified psychiatrist, by encouraging that psychiatrist to falsify the facts and his conclusions about Dr. Hason, thus further forcing Dr. Hason to produce documents and testify on his own behalf concerning private matters and to testify under cross-examination about private matters and to generate arguments, statements and documents revealing private matters, all necessary to try and overturn, oppose and influence the decisions of the Defendants. The Defendants acted in this manner, despite constant warnings to Defendants of the illegality of their acts.

As for a Seventeenth Cause of Action

43. The Plaintiff repeats allegations numbered 1-42, as if more fully set forth here. The Defendants conspired among themselves, while considering and doing the acts complained of in this Complaint, thus further violating the Plaintiff's rights under the federal and State laws already mentioned, including, but not limited to, 42 U.S.C. 1985 and the ADA.

Damages

44. With respect to each cause of action, the Defendants have severely injured Dr. Hason's reputation, irreparably and permanently, and damaged Dr. Hason emotionally, physically, and financially. Further, the consequences of the Defendants' acts mentioned herein have been to seriously impair Plaintiff's ability to proceed in an unimpaired fashion with his life and medical career. The Defendants, further, acted intentionally, recklessly and/or in violation of established law and therefore are liable to the Plaintiff for punitive damages in addition to compensatory damages, including all consequential and/or foreseeable damages.

45. The facts described in the entire Complaint are all alleged by the Plaintiff to be actionable under each and every theory stated in the Complaint.

WHEREFORE, the Plaintiff, Michael J. Hason, Requests that this Court decide and adjudge before or after a jury trial that the Defendants are liable for damages to the Plaintiff in the amount of $20,000,000 on each cause of action and an additional $20,000,000 for punitive damages on each cause of action, plus attorneys fees, expenses and costs, and requests that this Court direct the MBSC to issue to Dr. Hason a license to practice medicine in California, and find that the statute permitting the Medical Board of the State of California to find individuals, or Dr. Hason, unfit to practice medicine due to mental illness to be unconstitutional, void for reasons of its vagueness, overbreadth, violative of the Americans with Disabilities Act, violation of other federal civil rights statutes and the 14th Amendment of the Constitution of the United States, or to hold similarly as applied in the

case of Dr. Hason's application for a medical license, and grant other and further relief to the Plaintiff that is fair and just in the premises.

Dated: April 16, 1999

/s/ Michael J. Hason
Michael J. Hason, M.D.
Plaintiff, in pro per